No. 89-749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLAYTEX FAMILY PRODUCTS CORPORATION, PETITIONER

v.

ST. PAUL SURPLUS LINES INSURANCE CO., ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION

MICHAEL HOENIG
Counsel of Record
DANIEL V. GSOVSKI
Herzfeld & Rubin, P.C.
40 Wall Street
New York, New York 10005
(212) 344-5500

Attorneys for The Product Liability Advisory Council, Inc.

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Product Liability Advisory Council, Inc. ("PLAC", the "Council"), pursuant to Rule 36.1 of the Court, respectfully requests leave to file the accompanying brief *amicus curiae* in support of the petition of Playtex Family Products Corporation (Playtex) for a writ of certiorari. Counsel for petitioner has consented to such filing, but counsel for respondents have not consented.

The Council is a non-profit membership corporation formed in June, 1983, pursuant to Act 162, State of Michigan Public Acts of 1983. Its principal purpose is the submission of appellate briefs, as friend of the court, in cases raising significant issues affecting substantive and procedural law in the area of product liability.

The members of the Council include sixty-six major manufacturers and distributors of industrial, professional and consumer products of all types.[1] In addition, the members of the Council, as major business entities, own and operate real and personal property of virtually every sort. These products, property and activities are frequently involved in litigation. In this arena, the members of the Council, by virtue of their resources, regularly find themselves cast as "target defendants" by claimants in quest of deep pockets from which to fund substantial punitive damage recoveries. The members of the Council are thus acutely sensitive to the plight of the petitioner in this case and have a very real stake in the proper resolution of the issues presented.

Petitioner here has been stripped of $10 million in insurance coverage. Such coverage had been purchased specifically to cover the risk of "potentially devastating" punitive damage awards, see *Browning-Ferris Industries, Inc.* v. *Kelso Disposal, Inc.*, 109 S.Ct. 2909, 2923 (1989) (Brennan and Marshall, JJ., concurring), and, in the words of the relevant policies, to "FULLY INSURE" that risk "TO THE MAXIMUM EX-

[1] The members of PLAC are listed in the Appendix.

TENT PERMITTED BY LAW." Pet. App. at 19a. This outcome depended ultimately on expansive and improper overreaching by a State which—driven to impose its "overriding" public policy notwithstanding due process constraints—espoused a version of "minimum contacts" so attenuated as to undermine the doctrine in any meaningful sense. Astutely seizing the tactical opportunity thus presented, the respondent insurance carriers in this case were able to avoid their own contractual obligations through a preemptive strike declaratory judgment action in a substantively sympathetic yet constitutionally illegitimate forum.

The members of the Council, who must confront "skyrocketing" punitive damage claims and awards, see, *e.g.*, *Browning-Ferris, supra* at 2924 (O'Connor and Stevens, JJ., concurring in part and dissenting in part), are directly affected and understandably alarmed by such a result. Should decisions such as that below become the norm, Council members and other punitive damage "target defendants" will constantly face the threat that their efforts to cope with and spread these risks, including insurance premiums "skyrocketing" in tandem with punitive damage exposure, may be avoided by the very carriers who have freely agreed, typically for handsome fees, to assume them.

A broader potential for mischief implicit in this approach concerns the members of the Council as immediately and directly as does this case's specific scenario in the punitive damage context. Such jurisdictional and choice-of-law overreaching, if allowed to gain further favor with state courts, will inevitably foster preemptive "races to the courthouse" in virtually all instances in which astute litigants discern an opportunity to manipulate the outcome of a controversy through preemptive forum shopping. As entities with potentially arguable contacts with many jurisdictions throughout the nation, the members of the Council have no interest in becoming constantly enmeshed in such multifront, multistate litigation battles which, in the words of one court, "would reward Pearl Harbor tactics at the expense of the Marquis of Queensberry rules."[2]

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[2] *Brierwood Shoe Corp. v. Sears, Roebuck & Co.*, 479 F. Supp. 563, 568 (S.D.N.Y. 1979).

WHEREFORE, it is respectfully requested that PLAC be granted leave to file the attached brief *amicus curiae*.

Respectfully Submitted,

MICHAEL HOENIG
Counsel of Record
DANIEL V. GSOVSKI
Herzfeld & Rubin, P.C.
40 Wall Street
New York, New York 10005
(212) 344-5500
Attorneys for The
Product Liability
Advisory Council, Inc.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

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BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICUS*

Amicus respectfully refers the Court to the accompanying Motion for Leave to file the instant brief, *ante* at i-iii, which sets forth its interests and those of its members in this case.

STATEMENT

Amicus adopts in its entirety petitioner's Statement appearing at pages 2-6 of the petition and petitioner's statement of the Questions Presented to this Court for review. Additional facts upon which *amicus* urges grant of the petition are set forth as part of *amicus'* statement of Reasons for Granting the Petition, directly below.

REASONS FOR GRANTING THE PETITION

Both the nature of the error of the Supreme Court of Kansas and the factual posture of this case make it an ideal vehicle for this Court to examine and clarify certain key aspects of jurisdictional and choice of law due process in a manner which will obviate all-too-common misinterpretations of the type reflected in the decision below. *Amicus* fully supports the petitioner's arguments on all points, including the choice of law issue. This brief, however, confines its discussion to the jurisdictional aspects of the opinion below which warrant plenary review at this time.

In a series of decisions starting in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), this Court painstakingly has refined the twin concepts of "minimum contacts" with the forum and "traditional notions of fair play and substantial justice," both of which must be satisfied in order to justify any exercise of personal jurisdiction over an out-of-state defendant under the Due Process Clause. Under Kansas' approach, however, the critical elements of jurisdictional due process are effectively nullified. Minimum contacts are not meaningfully related to the specific events and transactions at issue, but need only "lie in the wake" of a defendant's previous minimum contacts arising in connection with other litigation relevant to other issues and parties. This approach stretches both "minimum contacts" and "traditional notions of fair play and substantial justice" beyond the breaking point.

The Kansas court has confused choice of law principles with jurisdictional principles. Thus, the result was rationalized below by an assertedly "overriding" Kansas public policy interest in applying its own law to a particular controversy. Of course, this factor may, in an appropriate case, be relevant to the second "fair play and substantial justice" prong of the due process inquiry. See, *e.g.*, *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 114 (1987). However, the decision below quite obviously blurs the critical distinction between the two inquiries. Moreover, Kansas' approach ultimately ignores the difference between the State's choice-of-law-related policy preferences as to a particular controversy and the minimum contacts and fundamental fairness *vis-a-vis* both the parties and the

specific transaction at issue without which the State cannot constitutionally be a forum in the first place. See, *e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980); *Kulko* v. *Superior Court*, 436 U.S. 84, 98 (1978); *Hanson* v. *Denckla*, 357 U.S. 235, 254 (1958). Such slipshod reasoning, which is finding increasing favor among courts in certain States, not only jeopardizes the liberty interests of potential defendants, but portends serious interstate mischief fraught with grave consequences for our federal system.

Such an approach invites State court jurisdictional and choice-of-law overreaching in contentious substantive areas, as in this case. In such cases, the temptation to sidestep the requirements of due process in order to seize "policy" control of an issue may, as below, prove irresistible, or, in the words of the Kansas Supreme Court, "overriding." *Amicus* submits that this factor, which is characteristic of numerous other recent state court decisions, alone should militate decisively in favor of plenary review in this case.

In the present case, Kansas' overreaching has been turned to maximum advantage by a litigant's aggressive procedural tactics. Here, a preemptive strike declaratory judgment was successfully employed to shop for a forum which would permit insurance carriers to avoid their own contractual indemnity obligations. Finding an "overriding" interest in so doing, the courts of Kansas shielded this gambit behind the cloak of Kansas' "public policy." In the topsy-turvy environment of the preemptive strike declaratory judgment, an erroneous assumption of jurisdiction has ironically allowed the Due Process Clause, contrary to this Court's specific warning, to be wielded by an adroit litigant "as a territorial shield to avoid interstate obligations freely assumed." *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 474 (1984).

Kansas' approach not only encourages such tactics by parties in litigation, but raises the unwholesome prospect of States vying with one another as preemptive fora for each others' disputes. Combined with an "aggressive" utilization of the declaratory judgment remedy, the expansive jurisdictional

approach exemplified in this case would invite constant interstate "races to the courthouse" in virtually every major litigation with at least two available fora with significantly different views of their relevant "public policy." It would be difficult to imagine a situation more fundamentally subversive of the "orderly administration of the laws," *International Shoe, supra* at 317, which this Court has emphasized as a key objective of the Due Process Clause. *E.g., World-Wide Volkswagen, supra* at 294 (1980).

The present record clearly exemplifies each of these troubling developments. Moreover, it does so in a factual posture which is virtually guaranteed to crystallize both the issues for this Court's consideration and the meaning of this Court's resolution of them.

I. DUE PROCESS DOES NOT SUPPORT PERSONAL JURISDICTION OVER A CONTROVERSY WHICH MERELY "LIES IN THE WAKE" OF A DEFENDANT'S MINIMUM CONTACTS WITH A DIFFERENT LAWSUIT.

Kansas assumed jurisdiction to abrogate a contract made and to be performed elsewhere by out-of-state entities by means of a simple metaphor. The decision below held, without further explanation, that "minimum contacts" sufficient to satisfy due process are present if the lawsuit at issue merely "lies in the wake" of a prior controversy which was properly tried in the State. App. at 11a.[3] Despite its evocative literary quality, this approach cannot be squared at any level with this Court's decisions.[4]

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[3] Citations to "App." are to the Appendix to the Petition.

[4] The error into which this metaphorical "analysis" led Kansas has been trenchantly noted by one of this century's leading federal jurists:

> When discoursing on the arts or belles-lettres colorful language stimulates the imagination, beguiles one into useful symbolism and opens up the avenues to creative thought. But in the process of rationalizing legal conclusions and arriving at a sound and proper determination of questions of the interpretation of statutes, procedural rules and constitutional limitations, cliches and rhetorical devices generally miss the mark.

Eisen v. Carlyle & Jacquelin, 479 F.2d 1005, 1013 (2d Cir. 1973) (Medina, J.), *vacated and remanded on other grounds,* 417 U.S. 156 (1974).

Some clue to the content of the "lies in the wake" concept is provided by Kansas' only other apparent analysis of the purported "contacts" of the petitioner with the State:

> In the instant action, if it were not for the sale of Playtex products in Kansas, resulting in the death of a Kansas resident, there would be no dispute between Playtex and its insurer.

App. at 12a. This, of course, is fully consistent with the metaphor of an occurrence which "lies in the wake" of some prior event. However, as the image of an infinitely expanding wake itself suggests, the reach of this concept is ultimately without discernable bounds. The "lies in the wake" view of minimum contacts thus proves useless in general and unconstitutional on the specific facts of this case.

In fact, Kansas' acknowledgement of the purely "but for" character of its minimum contacts approach is fatal to its constitutionality. This Court has ruled time and again that purely fortuitous contacts with a state, even when those contacts are unquestionably "foreseeable" in character, will not sustain jurisdiction in themselves. There must be some more "purposeful" relation which, in order to support specific jurisdiction, must give rise in some substantively meaningful sense to the controversy at issue. *E.g., Asahi,* 480 U.S. at 112; *Worldwide Volkswagen,* 444 U.S. 296-97. This analysis is strongly reinforced by this Court's conclusion in *Rush v. Savchuk,* 444 U.S. 320, 329 (1980), to the effect that the contract insuring a risk involved in tort litigation cannot be bootstrapped into a jurisdictionally significant contact of any nature with such a lawsuit, regardless of any attenuated "cause in fact" scenario which may be hypothesized.

Lastly, *amicus* notes that Kansas' "but for" analysis, ostensibly claiming to discern the requisite "purposeful" relation on the facts of this case, is not only erroneous as a matter of constitutional law but wrong as a matter of fact. Granted, in this case an actual verdict in Kansas brought the parties into confrontation in their coverage dispute. However, the issue of punitive damage coverage, a pure matter of law, was present in the contract from the day it was executed. Thus, in another

case, this same issue could readily ripen into declaratory judgment litigation in the absence of any actual punitive damages claim anywhere. For example, if premium payments were adjusted based upon some agreed exposure criteria, and the insurer disclaimed punitive coverage, yet continued to count the possibility of such judgments as "exposure" justifying an increased premium, this dispute would readily support a declaratory judgment. If no claim had previously arisen in Kansas at the time of that suit, even under Kansas' criteria, there would not even be "minimum contacts", much less a "wake" of such contacts in which to find this dispute lying. Every issue determinative of the outcome of this lawsuit could thus arise and be determined in the absence of any actual Kansas injury or claim.

The foregoing hypothetical demonstrates that Kansas' "contacts" with the prior tort action are, in any meaningful constitutional sense, utterly unrelated to the purely legal question of contractual construction involving entirely non-Kansas parties and transactions which is the sole subject matter of the present lawsuit.[5] No Kansas policy interest in the outcome of that issue, however fervently expressed, can overcome the State's absolute lack of any recognized minimum contact with the parties or transaction in suit.

II. A STATE'S SELF-PROFESSED "PUBLIC POLICY" INTEREST IN THE SUBSTANTIVE OUTCOME OF A DISPUTE CANNOT OVERRIDE THE ABSENCE OF MINIMUM CONTACTS AND FUNDAMENTAL FAIRNESS PREREQUISITE TO THE ASSUMPTION OF SPECIFIC JURISDICTION CONSISTENT WITH DUE PROCESS.

The first step on the road to its second major error is reflected in the Kansas Supreme Court's analysis of the tasks before it:

> We are required to review the relationship of Kansas and her sister states in the areas of personal jurisdiction and

[5] Indeed, the litigation posited could arise in the context of a decision by an insured as to whether to establish any contact with a state in which it was not doing any business at all.

> choice of law. The Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, section I of the United States Constitution allocate power among the states to exercise personal jurisdiction and to apply state law.

App. at 4a. This description of the relevant due process concerns is fatally flawed. In addition to melding both jurisdiction and choice of law under the single banner of interstate federalism, the decision below utterly ignores an interest which is implicated in both analyses and is paramount as to personal jurisdiction—the personal liberty interest of the persons over whom jurisdiction is to be exercised.

This Court has left no doubt that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations,' " noting specifically that "although this protection operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause ...' " *Burger King*, 471 U.S. at 472, n 13, quoting *International Shoe*, 326 U.S. at 319, and *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-703 n 10 (1982).

Kansas' initial failure even to recognize the ultimate due process liberty interest concern implicated in the case before it presages the short shrift given this consideration throughout the opinion, and also largely explains Kansas' acceptance of contacts merely lying "in the wake" of other contacts as an adequate basis upon which to assume jurisdiction.

The upshot is that what Kansas termed its "overriding" interest in applying its public policy to the issues in this case fatally distorted its minimum contacts approach. Even the strongest eagerness to vindicate its public policy cannot "override" a State's lack of requisite contacts with a defendant. To the contrary, "even if the forum state has a strong interest in applying its law to the controversy ... the Due Process Clause ... may ... divest the State of its power to render a valid judg-

ment." *World-Wide Volkswagen,* 444 U.S. at 294. See also *Hanson v. Denckla,* 357 U.S. at 251.

The adverse consequences of such an approach are magnified in the present instance by Kansas' virtually absolutist vision of the scope of its public policy prerogatives:

> No state should give effect to the law of another on principles of comity when the effect would be deleterious to the public policy of the forum state.

Head v. Platte County, Missouri, 242 Kan. 442, 749 P.2d 6, 9 (1988). Under such a view, the resolution of the jurisdictional issue in virtually every case will also resolve the choice of law question in favor of the forum. Despite its analytically separate nature, therefore, proper jurisdictional analysis has a practical "gate-keeping" role of immense significance to play in the choice of law area as well in order best to ensure a proper functioning of the federal system.

III. KANSAS' OVERLY EXPANSIVE JURISDICTIONAL APPROACH TO THIS CASE WOULD, IF GENERALLY ADOPTED, SERIOUSLY THREATEN THE "ORDERLY ADMINISTRATION OF THE LAWS" WHICH DUE PROCESS IS DESIGNED TO ENSURE.

"[T]he orderly administration of the laws," *World-Wide Volkswagen,* 444 U.S. at 294, within and among the several States is a primary concern which any exercise of jurisdiction must serve in order to comport with the Due Process Clause, as this Court has repeatedly emphasized. *E.g., International Shoe,* 326 U.S. at 317; *Hanson v. Denckla,* 357 U.S. at 250-51; *Asahi,* 480 U.S. at 113.

Little further comment on this factor is required. In the present case, astute litigants combined with an overreaching forum to void freely bargained and paid for contractual obligations. In this alliance, the litigant wielded the sword of a preemptive strike declaratory judgment, while the forum, eager to vindicate its "public policy," purported to shield this foray

behind the Due Process Clause. See *Burger King*, 471 U.S. at 474. If the events below were vindicated as a scenario for major interstate litigation, "races to the courthouse" will become the rule rather than the exception, and the States themselves will be all but invited to vie with one other as hospitable preemptive fora. Nothing more subversive of proper interstate relations within the context of the federal system could be imagined. This prospect alone should doom Kansas' exercise of jurisdiction here as incompatible with "traditional notions of fair play and substantial justice," even if minimum contacts were, arguendo, assumed.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE RESOLUTION OF THE ISSUES WHICH IT RAISES.

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16, n 10 (1984), this Court noted a series of basic issues affecting personal jurisdiction under the Due Process Clause which it declined to reach as not fairly presented in that case. As stated by the Court, these issues were:

> (1) Whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and
>
> (2) What sort of a tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists ...
>
> [(3) W]hether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to" but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

As is obvious, these issues are clearly encompassed in the questions presented by the instant petition. In addition, any exercise of jurisdiction here over the insurance contract action at issue must be based solely on the defendant's contacts which

sustained jurisdiction in the prior tort action. Therefore, the issues as to the nature of the relationship between the cause of action and the contacts on which jurisdiction is to be based could not be more clearly presented. Consideration of this issue is further enriched by numerous decisions of this Court over the years assessing due process as to both jurisdiction and choice of law in various insurance related contexts, see Petition at 12, 25 and cases cited, which supply an instructive body of analysis and doctrine upon which to draw.

The precise factual reach of minimum contacts — put colloquially, "how minimal can you get?" — is an issue which has engaged the courts and commentators ever since *International Shoe* ushered in the modern era in this field of constitutional doctrine. Petition at 17-22, *passim,* and authorities cited. The present record presents this issue, against the background of years of effort by this Court, other courts and commentators, in a factual posture which might fairly be termed "a law professor's dream of an examination question,"[6] because it clearly presents highly important jurisdictional and choice of law issues. This factor should both aid analysis and clarify the import of this Court's resolution of the issues presented. The factual pattern of the litigation below also concretely illustrates the damage to federalism concerns and the "orderly administration of the laws" among and between the States which an erroneous view of the jurisdictional constraints imposed by the Due Process Clause would foster. A better case in which to address these issues could hardly be found.

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[6] Prosser and Keeton, *The Law of Torts* § 43, p. 285 (1984 Ed.) (referring to *Palsgraf v. Long Island RR. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928)).

CONCLUSION

The petition should be granted.

Respectfully Submitted,

MICHAEL HOENIG
Counsel of Record
DANIEL V. GSOVSKI
Herzfeld & Rubin, P.C.
40 Wall Street
New York, New York 10005
(212) 344-5500

Attorneys for The
Product Liability
Advisory Council, Inc.

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APPENDIX

Member Companies of *Amicus Curiae*
Product Liability Advisory Council, Inc.
("PLAC")

American Home Products Corporation
American Telephone & Telegraph
Amoco Corporation
Anheuser-Busch Companies, Inc.
Automobile Importers of America
The Budd Company
Caterpillar, Inc.
Chrysler Corporation
Clark Material Handling Company
The Coleman Company, Inc.
Dana Corporation
John Deere & Co.
Defense Research Institute
Dow Chemical Company
Eaton Corporation
Exxon Corporation
Federal-Mogul Corporation
Fiat Auto U.S.A. and Ferrari, N.A.
Firestone Tire & Rubber Company
FMC Corporation
Ford Motor Company
Fruehauf Corporation
General Electric Company
General Motors Corporation
Goodyear Tire & Rubber Company
Great Dane Trailers, Inc
Harnischfeger Industries
Honda North America, Inc.
Hyundai Motor America
Johnson Controls, Inc.
Joy Technologies, Inc.
Kawasaki Motors Corp., USA

Eli Lilly and Company
Merck & Co., Inc.
Miller Brewing Company
Mitsubishi Motor Sales of America
Monsanto Company
Motor Vehicle Manufacturers Association of the United States, Inc.
Navistar International Transportation Corp.
Nissan Motor Corporation, USA
Otis Elevator Company
Paccar, Inc.
Piper Aircraft Corporation
Playtex Family Products Corp.
Porsche Cars North America, Inc.
Procter & Gamble Company
RJR Nabisco, Inc.
Rockwell International
Saab-Scania of America, Inc.
Snap-On Tools Corporation
Squibb Corporation
Sturm, Ruger and Company
Subaru of America, Inc.
TRW, Inc.
Toyota Motor Sales, U.S.A., Ltd.
U-Haul International
Union Carbide Corporation
Unocal Corporation
U.S. Tobacco
USX Corporation
Volkswagen of America, Inc.
Volvo North America Corporation
Vulcan Materials
Jervis B. Webb Company
Westinghouse Elevator Company
Yamaha Motor Corporation, U.S.A.